

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

EMMA ALVARADO, on behalf of
herself and on behalf of all others
similarly situated,

Plaintiff,

vs.

MICROSOFT CORPORATION, a
Washington corporation,
and DOES 1 through 100, inclusive,

Defendants.

No. C09-0189 MJP

SECOND AMENDED CLASS ACTION
COMPLAINT FOR:

- (1) VIOLATION OF THE WASHINGTON
CONSUMER PROTECTION ACT;
- (2) UNJUST ENRICHMENT; AND
- (3) DECLARATORY RELIEF UNDER
THE DECLARATORY JUDGMENT
ACT.

DEMAND FOR JURY TRIAL

Plaintiff Emma Alvarado ("Plaintiff") makes all allegations in this Second Amended Complaint based upon information and belief, except those allegations that pertain to Plaintiff, which are based on personal knowledge. Plaintiff's information and belief are based upon, *inter alia*, Plaintiff's own investigation and the investigation conducted by Plaintiff's attorneys. Each allegation in this complaint either has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

NATURE OF THE ACTION

Plaintiff brings this complaint individually on behalf of herself and on behalf of a class of persons similarly situated against defendant Microsoft Corporation ("Microsoft") for

1 violations of the Washington Consumer Protection Act and unjust enrichment arising out of
2 Microsoft's unfair and unlawful business practice of mandating that consumers must first
3 obtain a license for the Windows Vista Business, Windows Vista Ultimate, Windows 7
4 Business, or Windows 7 Ultimate operating system on their personal computers in order to
5 then purchase the Windows XP® Professional operating system. Microsoft refers to this
6 mandate as "downgrade rights." Microsoft's wrongful business practice has forced consumers
7 to pay more for personal computers than they otherwise would have to pay in the absence of
8 Microsoft's conduct. Plaintiff seeks to: (a) recover compensatory and treble damages for
9 injuries that Plaintiff and the class members have sustained resulting from Microsoft's alleged
10 wrongful actions and conduct; (b) require Microsoft to disgorge and restore all monies
11 wrongfully obtained by it; and (c) enjoin Microsoft from continuing to engage in the alleged
12 wrongful conduct.

13 **JURISDICTION AND VENUE**

14 1. Venue is proper in this judicial district under 28 U.S.C. § 1391(a) because
15 Microsoft resides in this judicial district.

16 2. This Court has jurisdiction over the claims alleged in this action because
17 Microsoft transacts substantial business within, and is subject to personal jurisdiction in, this
18 judicial district, and because a substantial part of the events giving rise to Plaintiff's claims
19 took place in this judicial district. Microsoft's actions and conduct have a direct effect on
20 consumers nationwide, including those residing within the State of Washington.

21 3. Jurisdiction is specifically conferred on this Court by various federal statutes
22 including, but not limited to, 28 U.S.C. § 1332(d), as amended by the CLASS ACTION FAIRNESS
23 ACT OF 2005, because Plaintiff and numerous other members of the proposed class are citizens
24 of states other than the State of Washington and because the amount in controversy exceeds
25 \$5,000,000.

PLAINTIFF

1
2 4. Plaintiff is a resident of the County of Los Angeles in the State of California.
3 On June 20, 2008, Plaintiff purchased a Thinkpad X61 laptop computer from Lenovo Group
4 Limited, for her own personal use and not for resale. At the time of her purchase, Plaintiff
5 wanted the Windows XP operating system for her laptop computer. However, in order to
6 obtain the Windows XP operating system that she wanted, Plaintiff was required to purchase a
7 laptop computer that included a license for using the Vista Business operating system – one of
8 Microsoft’s most expensive operating systems -- in order to “downgrade” the Vista Business
9 operating system to Windows XP Professional. Microsoft thus mandated that Plaintiff
10 purchase two operating systems for her laptop computer. In sum, in order to obtain the
11 operating system that she desired (Windows XP), Microsoft required Plaintiff to first purchase
12 a more expensive operating system (Vista Business) for which she had no need or desire.

DEFENDANTS

13
14 5. Microsoft is a corporation organized and existing under the laws of the State
15 of Washington, licensed to do and doing business in the State of Washington, with its
16 corporate headquarters located in Redmond, Washington, at 1 Microsoft Way, Redmond,
17 Washington 98052. Microsoft is the world’s largest seller of operating systems for personal
18 computers.

19 6. The true names and capacities of the defendants sued as Does 1 through 100,
20 inclusive, (“the Doe Defendants”) are unknown to Plaintiff, who therefore sues these
21 defendants by those fictitious names. Plaintiff will amend this complaint to allege the true
22 names and capacities of the Doe Defendants when they have been ascertained. The Doe
23 Defendants are the persons, firms and corporations who have participated with Microsoft in
24 the wrongdoings complained of and have performed acts and made statements to further them.
25 The Doe Defendants acted as co-conspirators and aided and abetted, or participated with,
26
27

1 Microsoft in committing the alleged wrongful acts or otherwise caused the damages suffered
2 by Plaintiff and the other class members.

3 7. The term "Defendants" means and refers to Microsoft and the Doe Defendants
4 together.

5 **GENERAL FACTS**

6 8. Microsoft is a computer technology corporation that develops, manufactures,
7 licenses, and supports a wide range of software products for personal computers ("PCs").
8 Microsoft's flagship products, the Windows operating systems, are used on over 90% of Intel-
9 based PCs, the dominant type of PC in the United States. Microsoft possesses (and for several
10 years has possessed) monopoly power in the market for PC operating systems. The operating
11 system is the most important program on a PC. Every PC must have an operating system to
12 run other programs. Operating systems perform basic tasks such as recognizing input from the
13 keyboard, sending output to the monitor, keeping track of files and directories on the hard
14 drive, and controlling devices such as optical drives and printers.

15 9. The primary channel through which Microsoft distributes its Windows
16 operating systems is pre-installation on new PCs by PC manufacturers (referred to as Original
17 Equipment Manufacturers, or "OEMs"). Because a PC can perform virtually no useful tasks
18 without an operating system, OEMs consider it a commercial necessity to preinstall an
19 operating system on the PCs they sell. And because there is no viable competitive alternative
20 to the Windows operating system for Intel-based computers, OEMs consider it a commercial
21 necessity to preinstall Windows operating systems on their PCs.

22 10. Both OEMs and Microsoft recognize that consumers have no commercially
23 viable substitute for Windows, and OEMs cannot preinstall Windows on their PCs without a
24 license from Microsoft. Because nearly all PCs in the United States are shipped with a copy of
25 Windows preinstalled, Microsoft has dictated the terms of its use by consumers -- referred to
26
27

1 as “End Users” - through its End User License Agreements (“EULA”) and imposes licensing
2 terms that restrict which versions of Windows may be sold on PCs.

3 11. On January 30, 2007, Microsoft launched Windows Vista with much fanfare
4 and touted it as the operating system for a new generation with a slick graphical interface and
5 many new features. But, the reaction to Vista was mostly lukewarm, and many customers
6 were still looking to obtain Windows XP. Direct OEM and retail sales of Windows XP ceased
7 on June 30, 2008. However, Microsoft mandated that consumers who still desired the
8 Windows XP operating system on new PCs must first purchase either Windows Vista Business
9 or Windows Vista Ultimate (“Vista”). Microsoft referred to this mandate as “Windows Vista
10 Downgrade Rights.”

11 12. Windows Vista Downgrade Rights provided that an OEM may facilitate the
12 End User’s downgrade rights from Vista to a qualified version of Windows XP Professional
13 on a new PC. This process is further defined in Microsoft’s Desktop Operating System License
14 Agreement (“DTOS”). The downgrade media [Windows XP] must be supplied to the OEM by
15 the End User and must come from a legally licensed version of Microsoft retail, OEM/System
16 Builder, or Volume License channels. Effectively, Microsoft requires the End User who seeks
17 Windows XP to purchase two operating systems, XP and Vista, for one PC, thereby causing an
18 increase in the price of that PC to the End User/consumer.

19 13. Since 2008, Microsoft has extended Windows Vista Downgrade Rights three
20 times: first to January 31, 2009; then again to July 31, 2009; and then again to October 21,
21 2009.

22 14. On October 22, 2009, Microsoft launched its most recent operating system
23 called Windows 7. Despite concerted efforts to push its Windows licensees to adopt the most
24 recent version of its operating systems, first Vista and now Windows 7, Microsoft has once
25 again extended the downgrade rights for obtaining Windows XP. Two editions of Windows 7
26 are eligible for downgrade rights: Windows 7 Professional and Windows 7 Ultimate. These
27 two versions are the most expensive versions of Windows 7. Windows 7 Professional buyers

1 will be able to downgrade to Windows Vista Business or Windows XP Professional, while
 2 Windows 7 Ultimate buyers can downgrade to Windows Vista Ultimate or Windows XP
 3 Professional. Downgrade rights will be granted for 18 months after Windows 7's launch, from
 4 October 22, 2009 to April 1, 2011. Microsoft refers to this version of downgrade rights as
 5 "Windows 7 Downgrade Rights."

6 15. Microsoft's business practice mandates that in order for the End User to obtain
 7 the Windows XP operating system, excluding Netbooks, the End User must first purchase a
 8 PC from an OEM with one of Microsoft's most expensive operating systems: formerly
 9 Windows Vista Business or Windows Vista Ultimate and now Windows 7 Professional or
 10 Windows 7 Ultimate. Only after the End User/consumer purchases a PC with one of the most
 11 expensive operating systems does Microsoft grant "downgrade rights" to the End User to
 12 authorize the OEM to install the End User's copy of XP. Thus, Microsoft's business practice
 13 mandates that, with the exception of Netbooks, the End User purchase two operating systems
 14 for one PC in order to obtain Windows XP.

15 **ALLEGATIONS OF CONCERTED ACTION**

16 16. At all relevant times, Defendants pursued a common course of conduct, acted in
 17 concert and conspired with one another to accomplish the offenses complained of, and have
 18 performed acts and made statements to further them. In addition to committing the alleged
 19 wrongful conduct giving rise to primary liability, Defendants further aided and abetted and
 20 knowingly assisted each other in perpetrating the wrongdoing complained of.

21 17. Whenever this complaint alleges any act, deed or transaction of any
 22 corporation, the allegation means that the corporation engaged in the act, deed or transaction
 23 by or through its officers, directors, agents, employees or representatives while they were
 24 actively engaged in managing, directing, controlling, or transacting the corporation's ordinary
 25 business or affairs.
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 27

CLASS ACTION ALLEGATIONS

18. Plaintiff brings this action as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of a class (“the Class”) defined as follows:

All persons who are residents of the United States of America, who purchased a personal computer that included a license for the use of the Windows Vista Business, Windows Vista Ultimate, Windows 7 Professional, or Windows 7 Ultimate operating system, and who “downgraded” their operating system to the Windows XP Professional operating system (including the Windows XP Tablet PC Edition and the Windows XP x64 Edition).

Excluded from the Class are Defendants, their officers, directors, employees, subsidiaries, divisions, units, and affiliates, as well as any judge, justice or judicial officer assigned to hear any proceeding in relation to this case.

19. Although the precise number of Class members is unknown to Plaintiff at this time and can only be determined by appropriate discovery, Plaintiff is informed and believes, based upon the nature of the trade and commerce involved, that the Class of persons affected by Defendants’ actions and conduct is so numerous, consisting of many hundreds of thousands of people, that joinder of all Class members is impracticable.

20. Plaintiff will fairly and adequately represent and protect the Class members’ interests, as required by Rule 23(a)(4). Plaintiff is an adequate Class representative, as she has no interests that are adverse to the other Class members’ interests. Plaintiff is committed to vigorously prosecuting this action, and to that end Plaintiff has retained counsel who are competent and experienced in handling class-action litigation on behalf of consumers.

21. Plaintiff’s claims are typical of the other Class members’ claims, as required by Rule 23(a)(3), because Plaintiff and each Class member purchased a personal computer that included a license for using the Windows Vista Business, Windows Vista Ultimate, Windows 7 Professional, or Windows 7 Ultimate operating systems and paid money to downgrade to the Windows XP Professional operating system.

1 22. Common questions of law and/or fact exist for all Class members, as required
2 by Rule 23(a)(2), and predominate over any individual questions as required by Rule 23(b)(3).

3 23. The common questions include, but are not limited to, the following:

- 4 a. whether Defendants' actions and conduct violate Washington's
5 consumer protection and unfair business practices laws;
6 b. the nature of Defendants' actions and conduct;
7 c. the effect of Defendants' actions on consumers within the State of
8 Washington and throughout the United States; and
9 d. the type and pattern of damages sustained by Plaintiff and the Class as a
10 result of the wrongful actions and conduct of Defendants.

11 24. A class action is superior to other available methods for fairly and efficiently
12 adjudicating the claims asserted in this action under Rule 23(b)(3) because:

- 13 a. the expense and burden of individual litigation make it economically
14 unfeasible for Class members to seek redress for their "negative value" claims other than
15 through the procedure of a class action;
16 b. if separate actions were to be brought individually by each Class
17 member, the resulting duplicity of lawsuits would cause undue hardship and expense to the
18 Court and the litigants by necessitating multiple trials of similar factual issues;
19 c. prosecuting separate individual actions would create a risk of
20 inconsistent adjudications of similar factual issues; and
21 d. absent a class action, Defendants likely would retain the benefits of their
22 wrongdoing, and there would be a failure of justice.

23 25. In the alternative, this action is certifiable under Rules 23(b)(1) and/or 23(b)(2)
24 because:

- 25 a. prosecuting separate actions by individual Class members would create
26 a risk of inconsistent or varying adjudications with respect to individual class members that
27 would establish incompatible standards of conduct for Defendants;

1 b. prosecuting separate actions by individual Class members would create
2 a risk of adjudications with respect to them that would, as a practical matter, be dispositive of
3 the interests of the other Class members not parties to the adjudications, or substantially impair
4 or impede their ability to protect their interests; and

5 c. Defendants have acted or refused to act on grounds generally applicable
6 to the Class, thereby making appropriate final injunctive relief or corresponding declaratory
7 relief with respect to the Class as a whole, and necessitating that the relief be extended to Class
8 members on a mandatory, class-wide basis.

9 26. Plaintiff is aware of no difficulty that will be encountered in the management of
10 this litigation that should preclude its certification as a class action.

11 27. The names and addresses of the Class members are available from Defendants'
12 records. Notice can be provided to the Class members by first class mail or otherwise, using
13 techniques and a form of notice similar to those customarily used in class actions arising under
14 federal law.

15 28. Plaintiff has incurred, and during the pendency of this action will incur,
16 attorneys' fees and expenses. These attorneys' fees and expenses are necessary for
17 prosecuting this action and will result in a benefit to the Class.

18 **NATURE OF DEFENDANTS' MISCONDUCT**

19 29. On or about January 30, 2007, Microsoft publicly released the first version of
20 the Windows Vista operating system ("Vista") – the long-awaited successor to the Windows
21 XP operating system. During the succeeding two years, Microsoft released multiple versions
22 of its Vista operating system – including Vista Home Premium, Vista Business and Vista
23 Ultimate. Vista Business and Vista Ultimate are higher-priced versions of the Vista operating
24 system that include specialized applications. Vista Business costs up to \$100 more than Vista
25 Home Basic; Vista Ultimate costs up to \$200 more than Vista Home Basic.

26 30. When Microsoft first launched Vista, it required OEMs to pre-install the Vista
27 operating system onto their PCs and to sell the PCs to consumers for a single price that

1 included the pre-installed Vista operating system. As the sole licensor of Vista, Microsoft
2 enjoys vast power over OEMs. As a result, during the initial period of time after Vista's
3 launch, Microsoft forced OEMs to significantly curtail their sales of PCs pre-installed with the
4 Windows XP operating system.

5 31. The public's reaction to the launch of Vista was not favorable. Consumers
6 reported numerous problems using the Vista operating system, and these problems were and
7 continue to be widely publicized in various media outlets. Among the problems cited have
8 been Vista's heavy horsepower requirements, its intrusive security measures and its
9 incompatibility with older legacy applications. In response to the public's dissatisfaction with
10 Vista, Microsoft decided to grant consumers who purchased a new PC with Vista the right to
11 "downgrade" the operating-systems software from Vista to Windows XP.

12 32. Initially, Microsoft made this "downgrade" right available to consumers for a
13 limited period of time, then until June 30, 2008. Subsequently, Microsoft extended the time
14 period until January 31, 2009, then until July 31, 2009, and then until October 21, 2009.
15 Plaintiff is informed, believes and alleges that these extensions were prompted by the
16 tremendous profits that Microsoft reaped from consumers who otherwise would not have
17 purchased Vista Business or Vista Ultimate, as well as Microsoft's need to capitalize on
18 consumer demand for the Windows XP operating system to enable Microsoft to recoup its
19 investment in developing and producing Vista.

20 33. Microsoft's "downgrade rights" policies state: "The right to downgrade is an
21 end-user right [documented in the EULA]...The End User must provide the downgrade media
22 and a valid Product Key..." These policies also state that: "A System Builder (when
23 authorized by the end user), or the end user [may install the Downgrade Software [for XP]].
24 Because downgrade rights are an end user right granted in the end user license agreement
25 (EULA), the end user must first be able to accept the EULA associated with the software
26 [Vista, and now Windows 7], so this software must be installed first before the Downgrade
27 Software is installed."

1 34. Although many consumers would prefer to purchase a new PC pre-installed
2 with the Windows XP operating system or at least not pre-installed with the Vista or Windows
3 7 operating systems, Microsoft has used its monopoly position in the PC operating systems
4 market to take advantage of consumer demand for the Windows XP operating system by
5 requiring consumers to purchase a PC that includes a license for the use of a Vista or Windows
6 7 operating system and to pay money to downgrade to the Windows XP Professional operating
7 system, using downgrade media provided by the consumer at the consumer's cost. To make
8 matters worse, Microsoft requires consumers to purchase a PC that includes a license for either
9 Vista Business or Vista Ultimate, and now Windows 7 Professional or Windows 7 Ultimate –
10 versions of the operating systems that: (a) are premium, more expensive versions of the home
11 versions of the operating systems: and (b) include specialized applications that are neither
12 needed nor wanted by an ordinary consumer seeking to purchase a PC primarily for personal,
13 non-business use.

14 35. Plaintiff is informed, believes and alleges that Microsoft conceived and
15 implemented the “right” for consumers to “downgrade” to the Windows XP Professional
16 operating system in order to: (a) maintain and/or inflate its sales figures for the Vista and
17 Windows 7 operating systems (particularly the Vista Business, Vista Ultimate, Windows 7
18 Professional or Windows 7 Ultimate versions) because Microsoft includes in its sales figures
19 all sales of pre-installed Vista and Windows 7 operating systems – even those that, at the time
20 of sale to the End User/consumer, have been “downgraded” to Windows XP Professional and
21 thus never were used or intended to be used by the consumer; and (b) recoup its investment in
22 developing and producing the Vista and Windows 7 operating systems by forcing consumers
23 to purchase the premium, more expensive versions of the Vista and Windows 7 operating
24 systems (Vista Business, Vista Ultimate, Windows 7 Professional, and Windows 7 Ultimate)
25 in order to “downgrade” to the Windows XP operating system.

26 36. In response to the high demand for downgrades, Microsoft eventually permitted
27 its OEMs to perform downgrades for the End User/consumer by installing Windows XP

1 directly at the factory. OEMs have charged consumers a range of fees to cover the full cost of
2 the downgrading. For example, in December 2008, Dell was charging consumers a total of
3 \$150 to downgrade from Vista Home Premium to Windows XP Professional. When
4 challenged regarding the reasonableness of the amount of its downgrade fee, Dell responded
5 that only \$20 of the fee was attributable to the actual price of Windows XP. The other \$130
6 was the cost of complying with Microsoft's requirement that, prior to downgrading to
7 Windows XP Professional, the standard Vista operating system first must be replaced with
8 either Vista Business or Vista Ultimate. In other words, prior to permitting the consumer to
9 "downgrade" to Windows XP Professional, Microsoft first mandates that the consumer
10 "upgrade" from the Home versions of its operating systems to either Vista Business, Vista
11 Ultimate, Windows 7 Professional or Windows 7 Ultimate— thereby forcing the consumer to
12 incur an unnecessary expense and creating revenue for Microsoft by virtue of the End User/
13 consumer purchasing two operating systems for one PC.

14 37. The downgrade "rights" that Microsoft has implemented and mandated for
15 Vista and Windows 7 contrast sharply with the previous and existing "downgrade" rights for
16 other Microsoft software and operating systems. Prior to introducing Vista, Microsoft had
17 permitted consumers to purchase a new license for its software or operating systems and to use
18 it to run an older version of the software or the operating system. For example, users were
19 permitted to purchase a license for Microsoft Office 2007 and use it to run Microsoft Office
20 2003 – at no additional cost beyond the original license fee. Similarly, a consumer could
21 purchase a license for the Windows XP operating system software and use it to run Windows
22 98 – again, at no additional cost beyond the license fee. Consumers who wish to downgrade
23 from Vista or Windows 7 to Windows XP, however, are forced to purchase two operating
24 systems when they only have a use or need for one of them. As a result, consumers are forced
25 to pay more for their PCs than they otherwise would have to pay due to the retail price
26 inflation that is directly attributable to Microsoft's requirement that consumers effectively
27 purchase two operating systems for one PC.

EFFECT ON END USERS/CONSUMERS

38. The PC operating systems market (“the Relevant Market”) is worth more than \$50 billion annually in the U.S. alone. As of October 2009, Microsoft Windows operating systems controlled approximately 90% of the Relevant Market. On July 18, 2008, Microsoft announced that it had sold more than 180 million Vista licenses, which equates to gross sales revenues of between 30 and 60 billion dollars from Vista licenses. Plaintiff is informed, believes and alleges that these figures include Vista licenses that have been downgraded to Windows XP.

39. During the past two years, approximately 35% of the consumers purchasing a new PC have paid to downgrade the operating system from Vista to Windows XP. In doing so, consumers have been forced by Microsoft to purchase two operating systems – one for which they have no use and will never use (Vista) and one which they desire to use (Windows XP) but are forced to pay a supra-competitive price to obtain via a “downgrade.” And because Microsoft has mandated that downgrade “rights” apply only to Vista Business and Vista Ultimate, Microsoft’s mandate has artificially inflated the demand for Vista Business and/or Vista Ultimate by approximately 54%, attributable to those consumers who purchased Vista Business or Vista Ultimate solely to be able to downgrade to Windows XP. Plaintiff is informed, believes and alleges that the same will hold true for the current launch of Windows 7.

40. Plaintiff and the other members of the Class have suffered injury to their property as a result of Defendants’ activities because they have been forced to purchase Vista and Windows 7 operating system software in order to obtain and use the Windows XP operating system software. As a result, Plaintiff and the other members of the Class are forced to pay more for a PC than they otherwise would have to pay due to the retail-price inflation that is directly attributable to Microsoft’s requirement that the End User/consumer purchase two operating systems for one PC.

1 47. Defendants' acts and practices are continuing in nature.

2 48. As a direct and proximate result of Defendants' acts and practices, Plaintiff and
3 the Class have suffered actual damages because they have been forced to purchase personal
4 computers that include a license for one premium operating system (Vista Business, Vista
5 Ultimate, Windows 7 Professional or Windows 7 Ultimate) in order to be able to downgrade to
6 a second operating system (Windows XP Professional) for the same PC. Thus, Plaintiff and
7 the other members of the Class are forced to pay more for a PC than they otherwise would
8 have to pay due to the retail-price inflation that is directly attributable to Defendants'
9 requirement that they purchase two operating systems for one PC.

10 49. Defendants' repeated acts or practices have affected numerous consumers both
11 prior to and after the transaction involving Plaintiff. Further, Defendants' acts and practices
12 continue to pose a real and substantial potential for repetition causing additional injury likely
13 to affect a substantial number of consumers.

14 50. Unless Defendants are enjoined from continuing to engage in these unfair
15 business practices, Plaintiff and other members of the Class will continue to be injured and
16 damaged by Defendants' unfair acts or practices.

17 51. As a result of Defendants' unfair acts or practices, Plaintiff and the Class are
18 entitled to recover compensatory damages, treble damages, reasonable attorneys' fees,
19 prejudgment interest, and costs of suit.

20 **SECOND CLAIM FOR RELIEF**

21 **(Unjust Enrichment)**

22 52. Plaintiff repeats and incorporates by reference, as though set forth at length, the
23 allegations contained in paragraphs 1 through 41 inclusive, above.

24 53. Benefits were conferred on Defendants when they required Plaintiff and the
25 other members of the Class to purchase two operating systems for one PC in order to use the
26 Windows XP operating system. These benefits include, but are not limited to: (a) the amounts
27 paid by Plaintiff and the other members of the Class for an operating system they did not want

1 to purchase (Windows Vista Business, Windows Vista Ultimate, Windows 7 Professional, or
 2 Windows 7 Ultimate); and (b) artificially increased or sustained sales of Windows Vista
 3 Business, Windows Vista Ultimate, Windows 7 Professional, and/or Windows 7 Ultimate.

4 54. Defendants were aware of or knew of these benefits conferred by Plaintiff and
 5 the other members of the Class.

6 55. Defendants accepted and have retained these benefits under circumstances that
 7 make it inequitable or unjust for them to do so.

8 56. Defendants' acts and practices resulting in unjust enrichment are continuing in
 9 nature.

10 57. Plaintiff and the other members of the Class are therefore entitled to a return or
 11 refund of the amounts that they paid for the Vista Business, Vista Ultimate, Windows 7
 12 Professional, or Windows 7 Ultimate operating system and are further entitled to recover
 13 prejudgment interest, attorneys' fees and costs of suit.

14 **THIRD CLAIM FOR RELIEF**

15 **(Declaratory Relief Under the Declaratory Judgment Act, 28 U.S.C. §2201 *et seq.*)**

16 58. Plaintiff repeats and incorporates by reference, as though set forth at length, the
 17 allegations contained in paragraphs 1 through 57 inclusive, above.

18 59. An actual controversy has arisen and now exists between Plaintiff and the other
 19 members of the Class, on the one hand, and Defendants, on the other hand, concerning their
 20 respective rights and duties. Plaintiff and the other members of the Class contend that
 21 Defendants' alleged activities are unfair acts or practices and result in Defendants' unjust
 22 enrichment. Defendants contend that their actions are lawful and proper in all respects.

23 60. A judicial declaration is necessary and appropriate at this time, under the
 24 circumstances presented, in order that Plaintiff and the other members of the Class may
 25 ascertain their rights and duties with respect to Defendants' alleged activities.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the members of the Class as defined herein, prays for judgment and relief as follows:

ON THE FIRST CLAIM FOR RELIEF

1. For compensatory damages in an amount according to proof at trial;
2. That the damages awarded be trebled under the RCW 19.86.090;
3. That Defendants be permanently enjoined and restrained from engaging in the alleged activities; and
4. For reasonable attorneys' fees, together with costs of suit and prejudgment interest.

ON THE SECOND CLAIM FOR RELIEF

5. For restitution or disgorgement of the monies received by Defendants.

ON THE THIRD CLAIM FOR RELIEF

6. That this Court declare that Defendants' activities complained of are unfair and unlawful.

ON ALL CLAIMS FOR RELIEF

7. That Plaintiff and the Class be awarded reasonable attorneys' fees, prejudgment interest at the statutory rate, expenses and costs of suit; and
8. That Plaintiff and the Class be granted other and further relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury.

1 DATED this 4th day of November, 2009.

2 TERRELL MARSHALL & DAUDT PLLC

3
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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby declare that on November 4, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Attorneys for Defendants

Dated this 4th day of November, 2009.

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